AIR FORCE SYSTEMS & LOGISTICS CONTRACTING COURSE 2000

BID PROTESTS

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PROTESTS

- WHAT IS A PROTEST
- WHY PROTESTS HAPPEN & WHAT YOU CAN DO TO AVOID THEM
- ADMINISTRATIVE PROTEST FORUMS
  - AGENCY PROTESTS
  - GAO PROTESTS
  - THE ATTORNEY'S ROLE
- FEDERAL COURT PROTESTS
- CONCLUSION

WHAT IS A PROTEST?

- WRITTEN OBJECTION BY INTERESTED PARTY TO:
  - SOLICITATION
  - CANCELLATION OF SOLICITATION
  - AWARD
  - TERMINATION OF AWARD

WHY PROTESTS HAPPEN

- BASIS FOR PROTESTS GENERALLY VAGUE
- COMMON ALLEGATIONS INCLUDE:
  - GENERAL FAILURE TO FOLLOW STATUTES (TYPICALLY CICA) AND REGULATIONS
  - RESTRICTIVE SPECIFICATIONS
  - LESS THAN FULL AND OPEN COMPETITION
  - AMBIGUITIES IN SPECIFICATION

WHY PROTESTS HAPPEN continued . . .

- LACK OF MEANINGFUL DISCUSSIONS
- DEVIATION FROM EVALUATION CRITERIA
- IMPROPER EVALUATION
  - AWARDEE, PROTESTER OR BOTH
- NO RATIONAL BASIS FOR DECISION
  - COMMONLY ALLEGED IN BEST VALUE DECISIONS

WHY PROTESTS HAPPEN continued…

- LACK OF INFORMATION
  - "FAILURE TO COMMUNICATE" - MEANINGFUL DISCUSSIONS - NOTICE OF AWARD
    - DEBRIEFINGS
  - PROTESTER SHOULD HAVE RECEIVED THE AWARD

HOW TO AVOID PROTESTS

- NO GUARANTEED PROTEST FREE CONTRACT AWARDS
- FOLLOW THE RULES AND RFP
  - PROACTIVE JAG INVOLVEMENT EARLY ON AND THROUGHOUT SOURCE SELECTION
    - HELP DEVELOP GOOD SOURCE SELECTION PLAN AND RFP
    - PAY CLOSE ATTENTION TO LOCAL/SPECIAL CLAUSES
    - INSURE COMPLIANCE WITH RFP
    - STAY INVOLVED

HOW TO AVOID PROTESTS
continued . . .

- INSURE THE OFFERORS ARE INFORMED
  - DEBRIEFING POLICY - TO RELEASE OR NOT TO RELEASE - POTENTIAL FOIA & 18 U.S.C. §1905 IMPLICATIONS
  - FAR 15.506(d) – OVERALL RANKING OF OFFERORS
  - KEEP OPEN COMMUNICATIONS WITH OFFEROR'S COUNSEL

AGENCY PROTESTS

- EXECUTIVE ORDER 12979
- FAC 90-45 (FAR 33.103)
- BEST EFFORTS TO RESOLVE
- ENCOURAGES ADR
- INDEPENDENT REVIEW
- SUSPENSION OF PERFORMANCE
- 10 DAYS TO PROTEST TO GAO

AGENCY PROTEST RULES

- FAR 33.103
- Pre-Award: Can't award contract
- Post Award
  - Suspension
    - 10 days after notice of contract award or w/n 5 days of required debriefing
- Agency protest does not extend time for obtaining stay at GAO
- Agency best efforts to resolve in 35 days
- Agency Override of GAO stay

PROTESTS AT THE GAO

- **Protest volume decrease**
  - **1993: 3,300 Protests filed**
  - **1999: 1,399 Protests filed**

- **Sustain rate increasing 1997: 12%**
  - **1998: 16%**
  - **1999: 21%**

GAO RULES

- 31 U.S.C. 3551 - 3556
- 4 CFR § 21
- FAR 33.1 et seq (and supplements)
- FASA/FARA CHANGES (See FAC 90-41)
- COMPTROLLER GENERAL DECISIONS
- COMPTROLLER PROCUREMENT DECISIONS

GAO RULES
continued . . .

- GROUNDS FOR DISMISSAL OF PROTEST
  - NOT AN "INTERESTED PARTY"
  - NOT TIMELY FILED
  - CONTRACT ADMINISTRATION ISSUES
  - SMALL BUSINESS SIZE STANDARDS
  - SECTION 8(A) AWARDS
  - RESPONSIBILITY DETERMINATIONS
  - OTHER GROUNDS FOR SUMMARY DISMISSAL

GAO RULES continued
Deadlines

- **Solicitation Improprieties**
  - **Prior to bid opening/receipt of initial proposals**
- **Other Protests**
  - **NLT 10 days after basis of protest is known or should have been known**
- **Required Debriefing**
  - **Debriefing required if requested w/n 3 days**
  - **Must file NLT 10 days after date of Debriefing**

GAO RULES continued
Deadlines

- **Automatic Stay (Pre-award/Post Award)**
  - **Can’t award if protest pending**
  - **Protest filed w/n 10 days of award or 5 days after required Debriefing**

GAO RULES continued . . .

- RECEIPT OF PROTEST: GAO HAS 1 DAY TO NOTIFY AGENCY
  - NOTICE TO AGENCY INVOKES SUSPENSION
    - NO RECOURSE FOR GAO FAILURE TO NOTIFY
  - SUMMARY DISMISSAL
- AGENCY REPORT DUE TO GAO IN 30 CALENDAR DAYS
- PROTESTER COMMENTS FILED AT GAO W/N 10 CALENDER DAYS OF RECEIPT
  - GAO WILL DISMISS IF PROTESTER FAILS TO FILE COMMENTS

THE GAO DECISION

- GAO DECISION ISSUED W/N 100 DAYS AFTER PROTEST FILED
  - EXPRESS OPTION - 65 DAYS
- GAO "RECOMMENDED" REMEDIES
  - DON'T EXERCISE OPTION(S)
  - TERMINATE CONTRACT
  - ISSUE A NEW SOLICITATION
  - AWARD CONSISTENT WITH STATUTE AND REGULATION
  - COSTS, FEES AND B&P

THE GAO DECISION
continued . . .

- REQUESTS FOR RECONSIDERATION
- GAO ANNUAL REPORT TO CONGRESS OF FAILURE TO FOLLOW RECOMMEND- TION
- REIMBURSEMENT OF COSTS TO GOVT

  MISREPRESENTATION,
  MISSTATEMENT,
  MISCERTIFICATION

ADR AT THE GAO

- GAO ENCOURAGES USE
- SAF/GC WILLING TO ENTERTAIN IN APPROPRIATE CASES
- AIR FORCE EXAMPLES
  - PERIODIC MEETING WITH CONTRACTOR CORPORATE OFFICIALS TO DISCUSS PERFORMANCE ISSUES

THE ATTORNEY'S ROLE

- THE PROTEST TEAM
  - Legal, Contracting, Program Office MAJCOM, SAF/AQ, SAF/GCQ, DOJ
- THE GOAL
  - A FULLY COORDINATED, SUPPORTABLE POSITION
    - DOCUMENTED IN AGENCY REPORT
      or
    - AGENCY DECISION TO REMEDY

THE ATTORNEY'S ROLE continued . . .

- THE SCHEDULE - TIMING IS CRITICAL
  - WHO RECEIVES NOTICE AND WHEN
- DISTRIBUTE COPIES OF THE PROTEST
- MEET PLAYERS AND DEFINE ROLES AND RESPONSIBILITIES USE THE SCHEDULE
- HELP PCO DRAFT STATEMENT OF FACTS
- STRONG COORDINATED MEMO OF LAW
- ALL RELEVANT DOCUMENTS
- PROTECTIVE ORDERS

THE ATTORNEY'S ROLE
continued . . .

- SEPARATE TEAM FOR DISCOVERY REQUESTS IF POSSIBLE
- PROTESTER DISCOVERY
  - MUST BE FILED CONCURRENTLY WITH PROTEST
  - ADDITIONAL REQUEST POSSIBLE BASED ON AGENCY REPORT
- GOVERNMENT DISCOVERY
- PROTEST MUST BE SUPPORTED BY LEGAL AND FACTUAL GROUNDS INCLUDING COPIES OF ALL RELEVANT DOCUMENTS

THE ATTORNEY'S ROLE
continued . . .

- COMMENTS ON AGENCY REPORT
  - ADDITIONAL GROUNDS OF PROTEST
    - MAY USE "NEW GROUNDS" AS BASIS FOR ADDITIONAL DISCOVERY
- REQUEST FOR HEARING - facts only
  - DISCRETION OF GAO
  - QUASI-JUDICIAL (video taped)
  - FIELD ATTORNEY SHOULD BE PRESENT
  - KNOWLEDGEABLE INDIVIDUALS

PROTESTS IN FEDERAL COURT

- ADMINISTRATIVE DISPUTE RESOLUTION ACT OF 1996
- AMENDS 28 U.S.C. 1491(b)
- POST AWARD CHALLENGES IN FEDERAL COURT
- EQUITABLE RELIEF/B&P COSTS
- APA STANDARD OF REVIEW
- COURTS NOT BOUND BY GAO

PROTESTS IN FEDERAL COURT continued

- **28 U.S.C. 1491(b)(1)**
- **Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgement on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or a proposed award or the award of a contract or any violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.**

PROTESTS IN FEDERAL COURT continued…

- DISTRICT COURTS AND COFC HAVE CONCURRENT JURISIDCTION
- DISTRICT COURT PROTEST JURISDICTION “SUNSETS” 1 JAN 2001 UNLESS EXTENDED BY CONGRESS
- FEDERAL COURT PROTEST GOING UP WHILE GAO NUMBERS GOING DOWN

PROTESTS IN FEDERAL COURT continued...

- **PROTEST NUMBERS**
  - **DIST CT 1997: 32 1998: 47**
  - **COFC 1997: 38 1998: 44**

- **POSSIBLE JURISDICTIONAL ISSUES**
  - **CICA STAY OVERRIDES**
  - **AGENCY DECISION TO PERFORM WORK IN-HOUSE**
- **SUNSET OF DIST COURT JURISDICTON?**

PROTESTS IN FEDERAL COURT continued…

- ISSUES
  - INTERESTED PARTY
  - STANDARD OF REVIEW
    - DIST CT TYPICALLY APPLIES APA STANDARD
    - COFC MAKES AGENCY DECISION SUBJECT OF JUDICIAL REVIEW
  - DISCOVERY

PROTESTS IN FEDERAL COURT continued...

- ISSUES continued...
  - DISCOVERY
    - APA LIMITS TO ADMINISTRATIVE RECORD
    - COURT MAY SUPPLEMENT TO MAKE INFORMED DECISION
  - ATTORNEYS FEES
    - AWARD ANY RELIEF COURT CONSIDERS PROPER
    - MONETARY RELIEF LIMITED TO B&P COST
      - EAJA FEES?

PROTESTS IN FEDERAL COURT continued…

- **NEW DEVELOPMENTS**
  - **JURISDICTION: Automatic Stay**
    - ***Ramcor Servs. Group, Inc. v. U.S*. 185 F.3d 1286 (Fed Cir 1999)**
    - **COFC Jurisdiction over Automatic Stay granted in GAO protest**
    - **"In connection with a procurement"**

PROTESTS IN FEDERAL COURT continued…

- **DEVELOPMENTS continued…**
  - **STANDING**
    - ***Ryan Co v. U.S*. 43 Fed. Cl. 646 (1999)**
    - ***Anderson Columbia Envtl. Inc. vs U.S*., 43 Fed. Cl. 693 (1999)**
    - ***Phoenix Air Group, Inc. v. U.S*. 46 Fed. Cl. 90 (2000)**

PROTESTS IN FEDERAL COURT continued...

- **DEVELOPMENTS continued...**
  - **TIMLINESS**
    - ***Cubic Defense Sys.v. U.S*; 45 Fed Cl 239 (1999)**
      - **Telephonic inquiry sufficient response for CBD Notice**
    - ***MVM, Inc. v U.S*. 2000 WL 204429 (Fed. Cl. Oct 21, 1999)**
      - **Solicitation protest made after award timely**

PROTESTS IN FEDERAL COURT continued…

- **DEVELOPMENTS continued…**
  - **DISCOVERY AND SUPPLEMENTATION OF THE ADMINISTRATIVE RECORD**
    - ***DGS Contract Serv., Inc. v. U.S*. 43 Fed. Cl. 227, 235 (1999)**
    - ***CCL Serv. Corp. v. U.S*. 43 Fed. CL. 680 (1999)**
    - ***MVM, Inc. supra*.**

PROTESTS IN FEDERAL COURT continued…

- **DEVELOPMENTS continued..**
  - **BURDEN OF PROOF**
    - ***Alfa Laval Separation, Inc, v. U.S*., 175 F.3d 1365 (Fed Cir 1999)**
      - **"Protester must show that there was a substantial chance it would have received contract award but for that error"**

PROTESTS IN FEDERAL COURT continued…

- **DEVELOPMENTS continued..**
  - **REMEDIES**
    - ***Dubinsky v. U.S.*, 43 Fed. Cl. 243 (1999)**
    - ***Chas. H. Tompkins Co. v. U.S*. 43 Fed. Cl. 716 (1999)**
    - ***Stratos Mobile Networks USA, LLC v U.S*. 44 Fed. Cl. 633 (1999)**

PROTESTS IN FEDERAL COURT continued…

- BEST PRACTICES
  - THOROUGH & WELL DOCUMENTED ADMINISTRATIVE RECORD
  - INTERPRET "RELEVANT" BROADLY
    - COURTS WILL PENALIZE GOVERNMENT IF IT FAILS TO INCLUDE RELEVANT DOCUMENTS

CONCLUSION

- **SOURCES**
  - **Comptroller General Decisions**
    - **http://www.gao.gov**
  - **Recent Articles**
    - **Feature Comment – The Government Contractor, Vol. 42, No. 15, Apr 12, 00**
    - **Briefing Papers, No. 98-6, May 98, *GAO Protests: Similarities & Differences in The Treatment of Government & Private Parties***
    - The Procurement Lawyer, Vol. 34, No. 1, Fall 98; *Expanded Bid Protest Jurisdiction at COFC*